

**THE STATE BAR OF CALIFORNIA  
INSURANCE LAW COMMITTEE of the BUSINESS LAW SECTION**

**APPELLATE LAW UPDATE**

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**SUPREME COURT:** There were no recent developments on insurance issues in the California Supreme Court.

**COURT OF APPEAL:** The California Court of Appeal published the four decisions that are of interest to attorneys practicing insurance law.

**1. Pollution exclusion in CGL policy bars coverage for insured furniture stripping company's liability for negligently discharging methylene chloride into a public sewer.** *American Casualty Co. of Reading, Pa. v. Miller* (Jan. 29, 2008, B192216) \_\_ Cal.App.4th \_\_ [2008 WL 223456] [Second Dist., Div. Three].

**2. "Absolute" mold exclusion bars coverage for mold losses regardless of Ins. Code section 530 and the efficient proximate cause doctrine.** *De Bruyn v. Superior Court (Farmers Group, Inc.)* (Jan. 14, 2008, B198622) \_\_ Cal.App.4th \_\_ [2008 WL 115745] [Second Dist., Div. Four].

The insured homeowner returned home from vacation to discover that a toilet had overflowed causing extensive water damage to the home, which led to mold contamination. The insured's homeowner's policy covered losses resulting a sudden and accidental discharge of water from plumbing fixtures. However, the insurer denied the insured's claim for mold damages based upon the policy's "absolute" mold exclusion, which provided that any loss resulting from mold is excluded regardless of its cause.

The insured's ensuing lawsuit against sued his insurer included an cause iof action for violation of the state's Unfair Competition Law (UCL) based on the insurer's reliance on the "absolute" mold exclusion to deny mold loss coverage. In opposition to the insurer's demurred to the UCL cause of action, insured argued that the exclusion was "illegal" because Insurance Code section 530 required all first party coverage disputes involving losses caused by both covered and uncovered perils to be resolved pursuant to the efficient proximate cause doctrine. After the trial court sustained the insurer's demurrer, the insurer sought writ relief.



The Court of Appeal denied the insured's writ petition, holding that the insurer properly denied coverage for mold losses under its "absolute" mold exclusion that "'plainly and precisely communicated' that mold damage is not covered" even when it stems from a covered loss. The court explained that Insurance Code section 530 does not prohibit an insurer from excluding from coverage particular injuries or damages in certain specific circumstances, or from providing coverage for only some, but not all, manifestations of a particular peril. Thus, while the efficient proximate cause doctrine can be employed to bring about a fair result within the reasonable expectation of both the insurer and insured, it cannot be used to mandate coverage that has been "'plainly and precisely'" identified as an excluded risk under the terms of the policy.

**3. Because fire insurance appraisal proceeding under Ins. Code section 2071 is an arbitration, a "disinterested" appraiser selected by the insured is immune from the insured's negligence action, but an expert retained by the insured is not protected by the litigation privilege against the insured's action alleging that he negligently failed to properly advocate the insured's position regarding replacement cost standards.** *Lambert v. Carneghi* (Jan. 11, 2008, A113388) \_\_ Cal.App.4th \_\_ [2008 WL 110510] [First Dist., Div. Four].

**4. Where a liability insurer settles claims against its insured tugboat company and then sues the tugboat company's other insurers for equitable contribution, the defendant insurance companies may not assert an arbitration clause in their contract with the tugboat company because the insurer's lawsuit does not arise from those contracts and it was not a party to those agreements.** *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (Jan. 11, 2008, A116710) \_\_ Cal.App.4th \_\_ [2008 WL 110098] [First Dist., Div. One].

**NINTH CIRCUIT:** The Ninth Circuit Court of Appeals published decisions in two areas that are of interest to attorneys practicing insurance law.

**1. Where an ERISA plan administrator has both discretionary authority to decide a claimant's qualification for benefits and an obligation to pay those benefits, a district court reviewing the administrator's decision to deny benefits must consider the administrator's inherent conflict of interest when and give the claimant an opportunity to present evidence on an issue the administrator cited for the first time in its final statement denying coverage.** *Saffon v. Wells Fargo & Co. Long Term Disability Plan* (9th Cir. Jan. 9, 2008. No. 05-56824) \_\_ F.3d \_\_ [2008 WL 80704].



**2. On remand from the United States Supreme Court, the Ninth Circuit affirms summary judgments in favor of three insurers sued for allegedly violating the Fair Credit Reporting Act because two of the insurers quoted the same rate they would have offered regardless of the applicants' credit rating, and the third insurer's misreading of the law was not reckless.** *Edo v. Geico Casualty Co.* (9th Cir. Jan. 9, 2008, No. 04-35279) \_\_ F.3d \_\_ [2008 WL 80635]; *Willes v. State Farm Fire and Casualty Co.* (9th Cir. Jan. 9, 2008, No. 03-35848) \_\_ F.3d \_\_ [2008 WL 80631]; *Spano v. Safeco Corp.* (9th Cir. Jan. 9, 2008, No. 04-35313) \_\_ F.3d \_\_ [2008 WL 80628].



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